



Federal Highway Administration

[Docket No. FHWA-2022-0023]

Notice of Proposed Waiver of Buy America Requirements for Electric Vehicle Chargers

AGENCY: Federal Highway Administration (FHWA), U.S. Department of
Transportation (DOT).

ACTION: Notice; request for comments.

SUMMARY: The Federal Highway Administration (FHWA) is seeking comments on a proposal under its Buy America waiver authorities to: modify its existing general applicability waiver for manufactured products to remove electric vehicle (EV) chargers; and waive certain Buy America requirements under FHWA regulations and the Build America, Buy America Act for the steel, iron, manufactured products, and construction materials in EV chargers in a manner that, over a deliberate transitional period, reduces the scope of that waiver. The proposed new waiver would initially waive all Buy America requirements for EV chargers and all components of EV chargers that are installed in a project and then phase-out the waiver with two changes during calendar year 2023 and one change in January 2024.

DATES: Comments must be received by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Please submit your comments to the Federal eRulemaking Portal at <http://www.regulations.gov/>, Docket: FHWA-2022-0023, and follow the online instructions for submitting comments.

Instructions: You must include the agency name and docket number at the beginning of your comments. Except as described below under the heading “Confidential Business Information,” all submissions received, including any personal information provided, will

be posted without change or alteration to <http://www.regulations.gov>. For more information, you may review the U.S. Department of Transportation's complete Privacy Act Statement published in the Federal Register on April 11, 2000 (65 FR 19477).

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Brian Hogge, FHWA Office of Infrastructure, 202-366-1562, or via e-mail at Brian.Hogge@dot.gov. For legal questions, please contact Mr. Patrick C. Smith, FHWA Office of the Chief Counsel, 202-366-1345, or via e-mail at Patrick.C.Smith@dot.gov. Office hours for FHWA are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

A copy of this Notice, all comments received on this Notice, and all background material may be viewed online at <http://www.regulations.gov> using the docket number listed above. Electronic retrieval help and guidelines are also available at <http://www.regulations.gov>. An electronic copy of this document also may be downloaded from the Office of the Federal Register's Website at: www.FederalRegister.gov and the Government Publishing Office's Website at: www.GovInfo.gov.

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments as CBI. You may ask FHWA to give confidential treatment to information

you give to the agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as “Confidential”; (2) send FHWA, along with the original document, a second copy of the original document with the CBI deleted; and (3) explain why the information you are submitting is CBI. Unless you are notified otherwise, FHWA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this RFI. Submissions containing CBI should be sent to: Mr. Brian Hogge, FHWA, 1200 New Jersey Avenue SE, HICP-20, Washington, DC 20590. Any comment submissions that FHWA receives that are not specifically designated as CBI will be placed in the public docket for this matter.

Background

The President has laid out a bold vision for making transformative transportation investments to support job growth and reshape the United States (U.S.) transportation system, strengthen the U.S. economy and competitiveness, and support a sustainable energy and climate future. The President has set the ambitious goal of building a national network of 500,000 EV chargers by 2030.¹ On November 15, 2021, the President signed into law the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA), (Pub. L. 117-58). The BIL makes the most transformative investment in EV charging in U.S. history, including \$5 billion over five years that will be made available under the new National Electric Vehicle Infrastructure (NEVI) Formula Program.² As outlined in statute, the purpose of the NEVI Formula Program is to “provide funding to States to strategically deploy EV charging infrastructure and to establish an interconnected network to facilitate data collection, access, and reliability.” *See* BIL, Division J, Title VIII, Highway Infrastructure Program heading, Paragraph (2).

¹ White House Fact Sheet: Biden Administration Advances Electric Vehicle Charging Infrastructure (Apr. 22, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-biden-administration-advances-electric-vehicle-charging-infrastructure/>.

² See <https://highways.dot.gov/newsroom/president-biden-usdot-and-usdoe-announce-5-billion-over-five-years-national-ev-charging>.

This purpose would be satisfied by creating a convenient, affordable, reliable, and equitable network of EV chargers throughout the country. BIL also includes many additional funding and financing programs with eligibilities for EV charging infrastructure, including formula, discretionary, other allocated, and innovative finance programs.³ These historic investments across the Federal government in EV charging under BIL will put the U.S. on a path to meeting the President's goal for EV charging infrastructure and ensuring a convenient, reliable, affordable, and equitable charging experience for all users.

BIL includes new Build America, Buy America provisions to strengthen domestic manufacturing. As the Administration implements the historic investments in EV charging infrastructure under the BIL, we seek to maximize the use of American made products and materials while also ensuring successful and timely delivery of these critical EV infrastructure projects. The manufacturing, assembly, installation, and maintenance of EV chargers all have the potential to not only support the President's policies on sustainability and climate, but also increase domestic manufacturing, strengthen our supply chains, and create good-paying, union jobs in the U.S.

In order to ensure delivery and meaningful results on EV charging projects using Federal-aid highway funds throughout the U.S., FHWA is considering making judicious use of its waiver authority under Section 313(b)(1) of Title 23 of the U.S. Code and 23 CFR 635.410(c), with respect to steel, iron, and manufactured products, and Section 70914(b) of the BIL, with respect to construction materials. Following establishment of an initial temporary public interest waiver for EV chargers, FHWA proposes to decrease the scope of the waiver over time to ensure the maximum utilization of goods, products, and materials produced in the United States. *See* BIL § 70935(a). The initial, temporary

³ Federal Funding is Available For Electric Vehicle Charging Infrastructure On the National Highway System, FHWA (April 22, 2022), available at https://www.fhwa.dot.gov/environment/alternative_fuel_corridors/resources/ev_funding_report_2022.pdf.

public interest waiver for EV chargers will allow manufacturers a short ramp up period to make needed investments to build and expand domestic production to quickly proceed in support of a sustainable energy and climate future. In addition, EV charger installation and maintenance can immediately create good-paying, union jobs in America that cannot be outsourced. Moreover, domestic jobs may also be created to manufacture domestically available components of those systems.

At the same time, consistent with Executive Order (E.O.) 14005, FHWA is also seeking to encourage first-movers who bring more EV charger and component manufacturing and assembly to the U.S. By shifting manufacturing and assembly processes to the U.S. for EV chargers and charger equipment as soon as practicable and making necessary arrangements with vendors to obtain appropriate certifications showing Buy America compliance, domestic manufacturing firms have potential to obtain significant first-mover benefits from the bold investments provided by BIL in this area. By proposing to gradually reduce the scope of the waiver to increase domestic content, FHWA aims to further incentivize domestic manufacturing of EV chargers and charger-related equipment, including maximizing domestic content. FHWA also seeks to maximize opportunities for American workers to manufacture, assemble, install, and maintain EV chargers consistent with BIL § 70935(a). The proposed transitional period, reducing the scope of the waiver in scheduled intervals, is intended to both support domestic manufacturing of EV chargers and timely construction of an EV charging network using Federal-aid highway funds by giving industry a clear timetable to increase domestic manufacturing and assembly of EV chargers.

On November 24, 2021, DOT and the U.S. Department of Energy (DOE) published a Request for Information (RFI) in the Federal Register intended to gather information from the public on the availability of EV chargers manufactured and assembled in the United States, including whether they comply with applicable Buy

America requirements for iron and steel. 86 FR 67115 (Nov. 24, 2021). The results of the RFI are summarized in the “November 2021 Request for Information” Section of this document.

Based on information obtained through the RFI and in recognition that the market continues to evolve, FHWA developed this proposal to support the President’s objectives on creating a safe, reliable, and efficient network of EV charging infrastructure, protecting the climate, and investing in domestic manufacturing and the expansion of good paying, union jobs.

Executive Orders

In January 2021, President Biden issued E.O. 14005, titled Ensuring the Future is Made in All of America by All of America’s Workers (86 FR 7475, Jan. 28, 2021). The E.O. states that the United States Government “should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States.” FHWA is committed to ensuring strong and effective Buy America implementation consistent with E.O. 14005, including for the transformative investment in EV charging infrastructure under the BIL.

In January 2021, President Biden also issued E.O. 14008, titled Tackling the Climate Crisis at Home and Abroad (86 FR 7619, Feb. 1, 2021). The E.O. states that the Nation faces “a climate crisis that threatens our people and communities, public health and economy, and starkly, our ability to live on planet Earth.” E.O. 14008, at Sec. 201. The Federal government has an opportunity to build modern and sustainable infrastructure, deliver an equitable, clean energy future, and put the United States on a path to achieve net-zero emissions, economy-wide, by no later than 2050. *Id.* The President directed the Federal government “to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a government-wide approach that

reduces climate pollution in every sector of the economy,” including through the “deployment of clean energy technologies and infrastructure.” *Id.* To attain the 2050 target, the President has set a goal of building a national network of 500,000 EV chargers by 2030. BIL provides a multi-billion-dollar investment to make this goal a reality.

This proposal supports the policies of both orders, as well as the President’s broader objectives.

Buy America Requirements

The Buy America requirements for steel and iron set forth at 23 U.S.C. 313 and 23 CFR 635.410 apply on FHWA-funded projects. These provisions require that all steel and iron that are permanently incorporated into a project must be produced in the United States unless a waiver is granted, including predominantly steel and iron components of a manufactured product. As applied to products other than iron and steel, the term “produced” in 23 U.S.C. 313 includes physical final assembly and manufacturing processes. This requirement applies to the obligation of Title 23, U.S.C. funds. For all predominantly steel or iron materials, products, or components to be used in projects that involve the obligation of Title 23, U.S.C. funds, all manufacturing processes, including application of a coating, must occur in the U.S. Coating includes all processes which protect or enhance the value of the material to which the coating is applied. Such projects involve both the acquisition and installation of such equipment. Additionally, FHWA’s Buy America requirement applies to all contracts regardless of the funding source if any contract within the scope of a determination under the National Environmental Policy Act (NEPA) involves an obligation of Federal funds. See 23 U.S.C. 313(h). Outside of the context of EV chargers, nothing in this waiver changes the longstanding requirement for iron and steel.

FHWA also has a longstanding Buy America nationwide general applicability waiver for manufactured products (Manufactured Products General Waiver). 48 FR

53099 (Nov. 25, 1983). As of the date of this notice, FHWA has not modified the Manufactured Products General Waiver, and the waiver continues to apply to manufactured products that are not predominantly steel and iron and are funded under Title 23. For this proposed waiver specific to EV chargers, FHWA proposes to remove EV chargers from the Manufactured Products General Waiver. Continuing to apply the Manufactured Products General Waiver to EV chargers would be inconsistent with the objectives of BIL’s Buy America, Build America Act, discussed below, and is not supported by currently available information on domestic manufacturing capabilities. (FHWA will be conducting a separate review of the broader applicability of the Manufactured Products General Waiver, as required by BIL § 70914(d), including an opportunity for public comment.) The proposed waiver in this notice only reviews whether FHWA should continue or discontinue application of the Manufactured Products General Waiver to EV chargers. OMB Memorandum M-22-11, also discussed below, states at page 13 that, in reviewing general applicability waivers, “agencies should consider narrowing the waiver in a manner that would support supply chain resilience and boost incentives to manufacture key products domestically.”

In addition to historic investment in American transportation and EV chargers, the BIL also includes the Build America, Buy America Act (the “Act” or “BABA”), which expands the coverage and application of Buy America preferences in Federal financial assistance programs for infrastructure. BIL, div. G §§ 70901-27. The Act applies those requirements to obligations made after May 14, 2022. BIL § 70914(a).

The Act provides that the preferences under Section 70914 apply only to the extent that a domestic content procurement preference as described in Section 70914 does not already apply to iron, steel, manufactured products, and construction materials. BIL § 70917(a)–(b). This provision allows Federal agencies to preserve existing Buy America policies and provisions that meet or exceed the standards required by the Act,

such as FHWA’s existing requirements for iron and steel. By statute at 23 U.S.C. 313, FHWA has existing Buy America domestic content preferences for steel, iron, and manufactured products.

FHWA’s existing Buy America requirement at 23 U.S.C. 313 does not specifically cover construction materials, other than to the extent that such materials would already be considered iron, steel, or manufactured products. Accordingly, the new Buy America preferences included under Section 70914 of the Act for construction materials became effective on FHWA projects on May 14, 2022. However, in order to deliver projects and meaningful results while ensuring robust adoption of Buy America standards, DOT established a temporary public interest waiver for construction materials (“Temporary Construction Materials Waiver”) for a period of 180 days beginning on May 14, 2022 and expiring on November 10, 2022. *See* Waiver of Buy America Requirements for Construction Materials, 87 FR 31931 (May 25, 2022). The Temporary Construction Materials Waiver is applicable to awards that are obligated on or after May 14, 2022 and before November 10, 2022. Unless extended, the waiver expires on November 10, 2022.

FHWA will only consider a Buy America waiver when the conditions of 23 U.S.C. 313(b) and § 70914(b) of the Act have been met. This includes: (i) when the application of the requirements under 23 U.S.C. 313(b) and § 70914 of the Act would be inconsistent with the public interest; or (ii) when products are not produced in the United States in sufficient and reasonably available quantities of a satisfactory quality.⁴ As explained below, this proposed waiver is in the public interest.

OMB Implementation Guidance

⁴ Section 70914(b)(3) of the Act also provides a cost-based condition for a waiver, which FHWA’s regulation addresses at 23 CFR 635.410(b)(3) through alternate bid procedures.

On April 18, 2022, OMB issued memorandum M-22-11, “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure” (“OMB Implementation Guidance”). The OMB Implementation Guidance addresses the topic of public interest waivers. The guidance notes that a “waiver in the public interest may be appropriate where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements established by the Act.” OMB Implementation Guidance at p. 10. The guidance also recognizes several instances in which Federal agencies may consider issuing a public interest waiver and encourages agencies to consider an adjustment period where time limited waivers would allow recipients and agencies to transition to new Buy America preferences, rules, and processes. *Id.* at p. 11.

Applicability of FHWA’s Manufactured Products General Waiver to EV Chargers

As of the date of this notice, FHWA’s Manufactured Products General Waiver remains in effect. Under existing policy and practice, FHWA generally applies its Buy America requirement to predominantly steel and iron components of manufactured products even if the product itself is not predominantly steel and iron.⁵ The responses to the 2021 RFI, as discussed below, indicated that steel may be used in certain components for EV chargers including the housing, cabinet, or enclosure. Exclusive reliance on the Manufactured Products General Waiver based only on assessment of steel and iron content of the product overall may not be a reliable compliance strategy for EV chargers with components containing iron and steel.

November 2021 Request for Information

⁵ See FHWA’s Buy America Questions and Answers for the Federal-aid Program, available at https://www.fhwa.dot.gov/construction/contracts/buyam_qa.cfm. The answer to question 12 explains that FHWA’s Buy America requirements apply to any predominantly steel or iron component of a manufactured product regardless of the overall composition of the manufactured product.

As also mentioned above, on November 24, 2021, DOT and DOE (collectively, “the Agencies”) published an RFI in the Federal Register to gather information from the public on the availability of EV chargers manufactured and assembled in the United States, including whether they comply with applicable Buy America requirements for iron and steel. 86 FR 67115 (Nov. 24, 2021).

The Agencies received 72 individual comments in response to the notice from a wide array of stakeholders, including state departments of transportation (State DOTs), local agencies, EV charger manufacturers and suppliers, auto manufacturers, industry associations, and transportation advocates.⁶ The majority of comments indicated that the EV charger industry and State DOTs are not immediately prepared to certify compliance for EV chargers on FHWA-funded projects, with many commenters emphasizing strong support for establishing a waiver. As of the comment closing date for the RFI on January 10, 2022, approximately 11 manufacturers believed they could produce EV chargers in compliance with FHWA’s Buy America requirement for steel and iron, although only three of these manufacturers were referring to direct current fast charging (DCFC) chargers. DCFC chargers will be the initial focus along the designated corridors for electric vehicles under the \$5 billion NEVI program.⁷ The responding manufacturers who believed their EV chargers comply with FHWA’s Buy America requirement offered differing interpretations on how that Buy America requirement is, or should be, applied to EV chargers. At least 13 manufacturers believed they could meet a domestic final assembly condition for either DCFC or alternating-current Level 2 (ACL2) chargers — although other commenters believed the meaning of this condition was too vague and did not respond. Specific comments from EV charger manufacturers are discussed in more

⁶ The comments can be found at regulations.gov Docket No. FHWA-2021-0015.

⁷ See NEVI Formula Program Guidance, at 12, 26, available at https://www.fhwa.dot.gov/environment/alternative_fuel_corridors/nominations/90d_nevi_formula_program_guidance.pdf.

detail below. A common theme in many comments from State DOTs, manufacturers, industry associations, and others was the need for regulatory certainty and further guidance on how FHWA's Buy America requirement will be applied to EV chargers funded under BIL.

Several comments from manufacturers responding to the RFI included confidential business information (CBI), which is exempt from public disclosure. Such CBI is not discussed with specificity in this notice.

Comments on DCFC Chargers. In the RFI, the Agencies asked whether there are existing EV chargers that meet FHWA's Buy America requirement for steel and iron. The comments revealed limited evidence of immediate production capability and capacity for DCFC chargers and other charger equipment that can be certified to meet FHWA's requirement and the national demand. DCFC chargers enable rapid charging through delivering DC electricity to the EV. Under the NEVI Formula Program, FHWA has explained that all EV charger infrastructure installed along the designated corridors should be DCFC chargers.⁸ At the time of the RFI, only three manufacturers — ChargePoint, FreeWire Technologies, Inc. (FreeWire), and Rhombus — believed that they had existing DCFC systems complying with FHWA's Buy America requirement. Other companies, such as Tritium, discussed plans to build DCFC chargers meeting FHWA's requirement in the future. While these comments show significant potential for the future of DCFC charger manufacturing in the U.S., uncertainty remains regarding their ability to immediately meet demand for Buy America-compliant DCFC chargers and other essential supporting equipment for EV chargers on FHWA-funded projects throughout the U.S.

⁸ See NEVI Formula Program Guidance, at 12, 26, available at https://www.fhwa.dot.gov/environment/alternative_fuel_corridors/nominations/90d_nevi_formula_program_guidance.pdf.

ChargePoint believes it has a method to achieve compliance with FHWA's Buy America requirement for steel and iron for DCFC chargers. Portions of its comments were marked as containing CBI and will not be discussed with specificity in this notice.

The second company, FreeWire, believes it would comply based on its interpretation of FHWA's *de minimis* threshold for steel and iron under 23 CFR 635.410. FreeWire stated that it intends to manufacture and deliver approximately 140 DCFC chargers in 2022 and believes it would comply with Buy America for nearly all of those chargers. FHWA's Buy America regulation allows for a minimal use of foreign steel and iron materials, if the cost of such materials, as they are delivered to the project, does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2,500, whichever is greater. 23 CFR 635.410(b)(4). FreeWire did not disclose the specific cost or amount of foreign steel and iron content in its DCFC charger system. As the cost of foreign iron and steel in the FreeWire chargers remains unknown to FHWA, it is uncertain whether this would be an effective compliance approach for contracts including multiple chargers or other steel or iron products. It is also unknown whether FreeWire could also provide other necessary elements or components of EV chargers to comply with FHWA's Buy America standard for steel and iron, such as distribution system upgrades, payment systems, networking and telecommunications equipment, energy storage systems, and other necessary supporting equipment. FreeWire stated that it intends to scale up production of its DCFC chargers in the next five years.

The last company, Rhombus, estimated that it can produce approximately 3,000 DCFC chargers annually meeting FHWA's Buy America requirement for steel and iron. It stated that it would trace the origins of the steel and iron components used in its charger by requesting certification from the suppliers but did not provide extensive detail on what that process would entail.

While comments from manufacturers such as ChargePoint, FreeWire, Rhombus, Tritium, Siemens, and others reveal great potential for domestic DCFC manufacturing, FHWA remains uncertain regarding their immediate ability to meet demand on all FHWA projects for EV chargers that satisfy FHWA's Buy America requirement within the next 12 months. Reasons for this uncertainty include:

(1) *Economy-wide factors outside of manufacturer control:* Economy-wide factors outside of the control of EV charging manufacturers, such as price volatility, may impact their ability to reliably deploy a sufficient supply of Buy America compliant EV chargers on FHWA projects.

(2) *Essential elements of EV charger systems outside of manufacturer control:* Certain necessary elements or components of EV charger systems, such as distribution system upgrades (including, *e.g.*, transformers), payment systems, telecommunications and networking equipment, energy storage systems, and other supporting equipment may, in many cases, be outside of EV charger manufacturers' control. For example, distribution system upgrades, generally made by utilities, are typically required for deployment of EV chargers. Although manufacturers have different options for components used within the charger product itself, their control may be more limited over external elements of the system, which are integral to its reliable function and operation.

(3) *Readiness of upstream suppliers to provide certifications:* EV charger manufacturers may only be able to demonstrate compliance for certain components of EV chargers to the extent that upstream suppliers are willing and able to provide detailed accountings of manufacturing processes and costs. This may take some time to accomplish.

(4) *Extraordinary immediate demand:* The unprecedented and immediate demand created by the transformative investment under BIL for EV chargers throughout

the U.S. may also impact manufacturers' ability to produce an adequate supply of chargers and other charger components that satisfy FHWA's Buy America requirement. Reliably meeting demand for EV chargers on FHWA projects is essential to staying on the path to meet policy goals in EO 14008 and the President's goal of a new network of 500,000 EV chargers by 2030. Some commenters responding to the RFI noted that demand for DCFC chargers in the U.S. already exceeded the available supply even before implementation of the BIL programs. For example, Veloce Energy noted that manufacturers were ramping up production in late 2021, but not yet meeting overall demand. In the near term, the supply of DCFC chargers manufactured to meet FHWA's Buy America requirement and able to successfully certify compliance of the same, if any, would likely be a small subset of the total supply.

(5) *Certification processes*: There is a need to establish compliance and certification processes focused specifically on EV chargers and other elements of EV chargers.⁹ Recipients of DOT financial assistance, including States, local communities, Tribal nations, and industrial vendors need to develop and transition to new compliance and certification processes for EV chargers. Some commenters expressed concerns about these processes including potentially inconsistent procedures in different States. Under existing certification processes, manufacturers may also find it infeasible to verify compliance without disclosing sensitive CBI.

(6) *Reliability*: The reliability of EV chargers may vary greatly in the industry. A key statutory purpose of the NEVI Formula Program is to facilitate reliability in the EV charging infrastructure it funds. *See* BIL, Division J, Title VIII, Highway Infrastructure Program heading, Paragraph (2). Given that charger models or

⁹ These certification processes will be similar to existing certification processes employed by DOT.

systems designed to comply with Buy America will generally be new or customized, manufacturers will need time to ensure they are also designed for reliability before producing them at scale. Designing new systems for reliability generally involves rigorous mechanical and environmental testing. Without adequate time for such testing, new or customized systems may not withstand the rigors of years in the field subjected to heat and freezing, UV radiation, many cycles of use, harsh handling, or other variables. Moreover, additional testing will be conducted on these newly manufactured products by the charging companies installing them and vehicle manufacturers whose vehicles will plug into them, which is another issue to consider when ensuring operability and reliability.

Given the factors discussed above, such as existing supply constraints, it appears unlikely that the limited set of DCFC chargers identified in response to the RFI as potentially able to meet FHWA's Buy America requirement could meet the full demand prompted by BIL and the NEVI program in the immediate future. Since market conditions may have changed since the time of the RFI in November 2021, FHWA seeks comment on appropriate waiver schedules below.¹⁰

Comments on ACL2 Chargers. A larger set of about nine manufacturers believed they are capable of producing Buy America-compliant ACL2 chargers. ACL2 chargers use an alternating-current electrical circuit to deliver electricity to the EV. Commenters believed that at least the following manufacturers can produce ACL2 chargers meeting FHWA standards: Oasis Charging Corp., d/b/a JuiceBar; Tritium; Wallbox USA, Inc.; Momentum Dynamics Corporation; BREEZEV, TADD LLC d/b/a Light Efficient Design; EVSE, LLC; Dunamis Clean Energy Partners, LLC; Siemens; and Blink

¹⁰ See, e.g., White House Fact Sheet: Biden-Harris Administration Catalyzes more than \$700 Million in Private Sector Commitments to Make EV Charging More Affordable and Accessible (Jun. 28, 2022), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/28/fact-sheet-biden-harris-administration-catalyzes-more-than-700-million-in-private-sector-commitments-to-make-ev-charging-more-affordable-and-accessible/>.

Network, LLC. As with DCFC chargers, while these comments show significant potential for the future of ACL2 charger manufacturing in the U.S., uncertainty remains regarding their ability to immediately meet demand for Buy America-compliant ACL2 chargers and other essential supporting equipment on FHWA-funded projects throughout the U.S.

Some of these manufacturers acknowledged that their chargers contain small amounts of foreign iron or steel that cannot presently be traced but appear to rely on either FHWA's *de minimis* threshold or Manufactured Products General Waiver. For the reason discussed above on FHWA's *de minimis* threshold, it is uncertain whether this would be an effective compliance approach for contracts including multiple chargers or other steel or iron products. Also, exclusive reliance on FHWA's Manufactured Products General Waiver may not be an effective compliance strategy for EV Chargers containing steel and iron components. Moreover, through this notice, FHWA specifically proposes to remove EV chargers from coverage under the Manufactured Products General Waiver. Other ACL2 manufacturers, although believing their chargers are manufactured domestically, discussed potential obstacles to obtaining formal certification of compliance with FHWA's Buy America requirement. For example, some manufacturers may be unable to certify compliance of all component parts or their ability to certify those parts may be affected by factors outside of their control.

It is also unknown whether these ACL2 charger manufacturers could provide other necessary elements or components of ACL2 chargers to comply with FHWA's Buy America requirement, such as distribution system upgrades, payment systems, networking and telecommunications equipment, energy storage systems, and other necessary supporting equipment.

Comments on Interpretation of FHWA's Manufactured Products General Waiver.

Other EV charger manufacturers also offered legal interpretations on why either a DCFC

system or ACL2 charger system may comply with FHWA's Buy America requirement even if containing more than a *de minimis* amount foreign iron and steel. These interpretations generally relied on FHWA's Manufactured Products General Waiver and a 1997 FHWA policy memorandum related to that waiver.¹¹ Commenters stated that EV chargers may fall under the Manufactured Products General Waiver because they are not predominantly comprised of iron or steel. FHWA's RFI requested information on what percent of the total price of an EV charger is typically for steel and iron. Responses from manufacturers varied widely, from over 50 percent to only one or two percent.

Many of the responses addressing the Manufactured Products General Waiver focused on the overall steel and iron content of EV chargers but gave less information on the steel and iron content of charger components. As explained above, even if the product itself is not predominantly iron and steel, FHWA's Buy America requirement applies to predominantly steel and iron components of manufactured products under existing policy and practice. Steel is often used in components of EV chargers including the housing, cabinet, or enclosure.

Comments on Steel and Iron Components of EV Chargers. Commenters indicated that EV chargers with housing, cabinets, or enclosures made mostly of steel generally have a higher percentage of steel and iron content, usually ranging from five to 30 percent of the total costs of the charger, but also exceeding 50 percent in some cases. Commenters also indicated that EV chargers with housing, cabinets, or enclosures made mostly of other materials such as aluminum or plastic generally have a much lower percentage of steel and iron content, often below five percent. Many commenters indicated that most of the cost and value of an EV charger is in the parts found inside the housing, cabinet, or enclosure.

¹¹ See <https://www.fhwa.dot.gov/programadmin/contracts/122297.cfm>.

In addition to the housing, cabinet, or enclosure, commenters also identified at least the following components or subcomponents of EV chargers as potentially containing some amounts of iron or steel: (i) the framework or the internal structural frame; (ii) the pedestal; (iii) power modules; (iv) the power transformer; (v) heating and cooling fans; (vi) brackets and mounting brackets; (vii) cord and cable management components; and (viii) screws, bolts, and washers.

Comments on Domestic Final Assembly Condition. The Agencies also asked in the RFI whether there are existing EV chargers that are currently assembled in the United States that could meet a domestic final assembly condition. Manufacturers and other commenters provided a range of responses with some manufacturers believing they meet the condition and others believing that no manufacturers meet the condition at present. Manufacturers that believed they could meet a domestic final assembly condition for either DCFC or ACL2 chargers include at least: In-Charge Energy, Inc.; Oasis Charging Corp, d/b/a JuiceBar; Wallbox USA, Inc.; Momentum Dynamics Corporation; ChargePoint; Siemens; Electrify America, LLC; BTC Power; EVSE, LLC; Dunamis Clean Energy Partners, LLC; Atom Power; EvoCharge Philips and Temro; and Rhombus. Some commenters noted that they were not aware of a precise and consistent definition of “domestic final assembly” and this uncertainty prevented them from opining on the question.

Regarding a possible domestic final assembly condition, some commenters questioned whether manufacturers meeting such a condition could immediately meet all existing market demand for EV chargers in the U.S. in late 2021 — even before considering the anticipated surge in market demand prompted by the investment in EV chargers under the BIL. Given practical constraints on immediately ramping up production capacity, significant uncertainty remains on whether demand could be met throughout the U.S. if such a condition were applied to the proposed EV charging waiver.

It is also unknown whether other necessary elements or components of EV chargers could be supplied to meet the same domestic final assembly condition, such as distribution system upgrades, payment systems, networking and telecommunications equipment, energy storage systems, and other necessary supporting equipment. Veloce Energy commented that it believes it could meet such a condition for battery energy storage systems, but little additional information is available on the ability of supporting equipment for EV chargers to meet a domestic final assembly condition.

Comments on Potential Waiver of Buy America Requirements. Many commenters also offered opinions on the best application of Buy America during the initial implementation of programs with eligibilities for EV charging under BIL. These commenters requested a wide range of timelines to allow manufacturers to ramp up production of EV chargers that meet Buy America requirements and resolve supply chain issues and other compliance and certification concerns. Many commenters suggested establishing a waiver period for EV chargers ranging from a few months to several years. Others recommended an incremental approach to applying Buy America requirements to EV chargers to ensure that a sufficient volume of chargers is available immediately while allowing gradual progress on production capability and capacity.

For example, the American Association of State Highway and Transportation Officials (AASHTO) strongly recommended a “staged” or incremental approach to the application of Buy America requirements to EV charger equipment during the initial implementation of the BIL to facilitate efficient and effective deployment in the first few years. Electrify America suggested establishing a 36-month path to compliance during which DOT should exercise enforcement discretion on Buy America requirements to allow companies to expand their U.S. operations. Amp Up observed that the delivery time for EV chargers is significantly delayed at present and may lead to project timelines in excess of over a year under Buy America requirements. The Zero Emissions

Transportation Association (ZETA) recommended establishing an interim national Buy America waiver for EV chargers to allow near-term implementation of BIL programs with eligibilities for EV chargers.

Comments Requesting Additional Buy America Guidance. Many commenters also requested additional guidance on the application of Buy America requirements to EV chargers to provide regulatory certainty and reduce the potential for inconsistent interpretations and applications of Buy America requirements on FHWA-funded EV charger projects. For example, AASHTO indicated that agencies and vendors need additional technical guidance. It suggested that nationwide consistency is needed in this area, as well as consistency between modal agencies within DOT. Another comment recommended consistent regional interpretation of FHWA's Buy America requirements and enabling manufacturers to demonstrate compliance through secure channels, such as independent third-party compliance verification. Another comment recommended clarification from FHWA to industry on Buy America requirements to address confusion in the market around the rules, definitions, interpretation, and audit measures in the areas of iron and steel calculation, percent of domestic content, applicability of waivers such as the Manufactured Products General Waiver, the meaning of "predominantly," and necessary documentation for audits and compliance. ZETA recommended that FHWA provide certainty on whether EV Chargers qualify for its Manufactured Products General Waiver. FLO Services, USA also requested FHWA to clarify whether chargers are manufactured products exempt from FHWA Buy America requirements; this commenter believes that if EV chargers are classified as iron and steel products it would likely exclude the entire industry from accessing funding in BIL for EV chargers.

Content of Proposed Waiver and Request for Comments

With respect to EV chargers as defined in this proposal, FHWA is requesting comment on its consideration of applying its authority under Section 313(b)(1) of Title

23 of the U.S. Code and 23 CFR 635.410(c), with respect to steel, iron, and manufactured products, and Section 70914(b) of the Act, with respect to construction materials, to provide a waiver of applicable Buy America requirements for EV chargers on FHWA-assisted infrastructure projects, on the basis that applying the domestic content preferences for these materials would be inconsistent with the public interest. Outside of the context of EV chargers as defined in this proposal, FHWA does not propose any additional changes to its existing policies and requirements for steel, iron, manufactured products, or construction materials through this notice, which may be addressed through separate processes. FHWA wants to ensure that its waiver allows recipients and subrecipients to use Federal-aid highway funds for EV chargers on their projects in support of policies and goals stated in E.O. 14008 as a partial phase-out is implemented during calendar year 2023.

FHWA seeks to establish a schedule that will ensure a sufficient and reliable supply of EV chargers is available for Title 23 U.S.C. and BIL-funded programs, including NEVI, to allow timely and strategic deployment of EV charging infrastructure across the United States. *See, e.g.*, BIL, Division J, Title VIII, Highway Infrastructure Program heading, Paragraph (2). Based on comments received in response to this notice, FHWA may also find that different alternative dates are warranted for the final waiver. FHWA requests comments on all phases of the proposed schedule set forth in this notice, including:

- Supporting information for alternative dates if applicable;
- Whether there should be four phases as proposed;
- Whether industry expects its production rates and capacity for chargers to be consistent with the proposed schedule; and
- How the proposed schedule or alternative dates impact installation schedules in the field.

For comments urging an extension of the timeline, FHWA requests an indication of how many chargers would be fully compliant with BABA requirements at each phase of the proposed waiver and by the end of the five-year NEVI program¹² — and also how many would not be compliant at each phase. For comments urging a shortening of the timeline, FHWA requests information supporting the reliable availability of compliant chargers earlier than proposed. FHWA also generally requests comment regarding the reliability of chargers, including new and custom chargers designed to comply with domestic content procurement preferences; cost competitiveness of chargers; production rates and capacity of chargers; and timing of delivery upon order or purchase of chargers. FHWA also includes additional requests for comment below in the context of specific elements of the proposed waiver.

Initial Phase and Removal of EV Chargers from Manufactured Products General Waiver. FHWA is proposing to initially apply a complete waiver to EV chargers and all components of EV chargers that are installed in a project during calendar year 2022, including waiving requirements for steel, iron, and manufactured products under Section 313(b)(1) of Title 23 of the U.S. Code and 23 CFR 635.410(c); and requirements for construction materials under Section 70914(b) of the Act. FHWA also proposes to remove EV chargers from its existing Manufactured Products General Waiver on the effective date of this proposed waiver. Removing EV chargers from the scope of the existing Manufactured Products General Waiver will avoid confusion and allow FHWA to clearly describe the domestic content procurement preferences applicable to EV chargers within the scope of a single waiver.

¹² See NEVI Program Fact Sheet, available at https://www.fhwa.dot.gov/bipartisan-infrastructure-law/nevi_formula_program.cfm.

Partial Phase-Out of Waiver. Following the initial proposed phase in calendar year 2022, FHWA proposes to partially phase-out the waiver in two steps during calendar year 2023 and arrive at the final proposed phase on January 1, 2024. Specifically:

- Beginning on January 1, 2023, FHWA proposes to remove from the waiver EV chargers whose final assembly process does not occur in the United States. On and after that date, for EV chargers that are installed in a project FHWA proposes the waiver would be applicable only if final assembly occurs in the U.S.
- Beginning on July 1, 2023, FHWA proposes to also remove from the waiver EV chargers for which the cost of components manufactured in the United States does not exceed 25 percent of the cost of all components. On and after that date, for EV chargers that are installed in a project through December 31, 2023, FHWA proposes the waiver would be applicable only if: (i) final assembly occurs in the U.S.; and (ii) the cost of components manufactured in the United States exceeds 25 percent of the cost of all components.
- Beginning on January 1, 2024, and thereafter, FHWA proposes to also remove from the waiver EV chargers for which the cost of components manufactured in the United States does not exceed 55 percent of the cost of all components. On and after that date, FHWA proposes the waiver would be applicable only if: (i) final assembly occurs in the U.S.; and (ii) the cost of components manufactured in the United States exceeds 55 percent of the cost of all components.

The waiver would then remain in place until terminated by FHWA. However, in accordance with Section 70914(d)(1) of the Act, FHWA would commence a review of the waiver not less than 5 years after the date on which the waiver is issued.

Consideration of Different Schedules for DCFC and L1/L2 Chargers. FHWA also seeks comments on whether to establish different waiver phase-out schedules for: (i) DCFC chargers; and (ii) Level 1 and ACL2 chargers based on projected and anticipated

availability and volume of different types of chargers. If different schedules are warranted, FHWA also seeks comment on what the phase-out schedules should be for those categories and why they should differ.

Proposed Meaning of Cost of Component Under Waiver. For the purpose of this waiver, FHWA proposes the cost of a component to be based on whether it is purchased or manufactured when it is incorporated into the EV charger. To determine the allowable costs included in purchased or manufactured components, FHWA proposes to use FAR 25.003.¹³ To determine overhead costs that are generally allocable, FHWA proposes to use FAR 31.201-4.¹⁴

FHWA proposes the costs for purchased components to include the acquisition costs (including transportation costs to the place of incorporation into the end product) and any applicable duty (regardless of whether a duty-free certificate of entry is issued). FHWA proposes the costs for manufactured components to include all costs associated with the manufacture of the component (including transportation costs and quality testing), and allocable overhead costs, but to exclude profits and any labor costs associated with the manufacture of the end product. FHWA proposes allocable overhead costs to generally: (a) include costs incurred specifically for the contract; (b) benefit both the contract and other work and can be distributed to each in reasonable proportion to the benefits received; or (c) are necessary to the overall operation of the business, even if a direct relationship to any particular cost objective cannot be shown.

FHWA requests comments on the proposed meaning of cost of component described in this notice.

Proposed Meaning of EV Charger Under Waiver. For the purpose of this waiver, FHWA proposes the term “EV charger” to include EV chargers and associated payment

¹³ 48 CFR 25.003.

¹⁴ 48 CFR 31.201-4.

systems, distribution systems, telecommunications and networking equipment, energy storage systems, and other supporting equipment and systems: (i) in the immediate vicinity of a charger or group of chargers; and (ii) essential to the function or operation of a charger or group of chargers. For the purpose of this waiver, FHWA proposes the term “charger” to exclude parking areas adjacent to the EV chargers and lanes for vehicle ingress and egress. For any areas, products, or materials excluded under the waiver, FHWA’s existing Buy America requirements and policies will continue to apply, including the new requirement applicable to construction materials established under BABA following expiration of DOT’s Temporary Construction Materials Waiver. FHWA requests comment on this definition, including whether the waiver should apply to manufactured products that are external to the EV charger itself but in its immediate vicinity and essential to its function or operation.

Proposed Meaning of Installation Under Waiver. For the purpose of this waiver, FHWA proposes “installed in a project” to mean the point at which an EV charger is permanently incorporated into or affixed to a Federal-aid funded infrastructure project.

Consideration of Use of Either Installation Date or Other Date for Waiver Effective Date and Phase-Out Dates. FHWA also seeks comments on whether to use the installation date of the EV charger (as proposed) or some other date (*e.g.*, the date of obligation of funds, the manufacturing date, the date of final assembly) as the effective date for the waiver and the dates for the phase-out schedule of the waiver. FHWA proposes to use the installation date in this notice but will consider using a different trigger as the compliance date based on comments received.

Consideration of Exclusion of Predominantly Steel and Iron Components from Coverage Under Waiver. FHWA seeks comments on whether and how to apply its existing Buy America requirement for iron and steel to any specific predominantly steel and iron EV charger components (*e.g.*, by excluding certain predominantly steel and iron

components from the scope of the waiver). For example, steel and iron items identified in the RFI include the housing, cabinet, or enclosure; the framework or the internal structural frame; the pedestal; power modules; and others. Finally, FHWA also requests information supporting the reliable availability of such steel and iron components, which are capable of complying with FHWA's existing Buy America policy.

Request for Comments on Proposed NEVI Requirements for OSHA and Energy Star Certifications. Under the NEVI program notice of proposed rulemaking (NPRM), FHWA proposes to require all EV chargers to obtain certification from an Occupational Safety and Health Administration (OSHA) Nationally Recognized Testing Laboratory. 87 FR 37262 (Jun. 22, 2022). The NEVI NPRM also proposes to require ENERGY STAR certification for ACL2 chargers. FHWA requests comment on whether EV chargers discussed in response to other questions in this notice would meet the proposed NEVI requirements for OSHA and Energy Star certifications.

Justification for Proposed Waiver

With the goal of accelerating the deployment of crucial EV chargers projects in a timely manner, and ensuring that FHWA's transportation partners in States, Tribes, Territories, and MPOs can use BIL funding for EV chargers, FHWA is considering the waiver on the basis that: (i) immediately applying all applicable domestic content preferences for these products would be inconsistent with the public interest because it is likely to delay immediate implementation of BIL programs providing funding for EV chargers, which are a key strategy for reducing greenhouse gas emissions, during an interim phase period between the effective date of the waiver and December 31, 2022; (ii) during the intermediate phase during calendar year 2023, it is in the public interest to gradually reduce the scope of the waiver to provide industry with a clear timetable to increase domestic manufacturing and assembly of EV chargers while still ensuring that a supply of EV chargers is widely available for Federal-aid highway projects; and (iii)

following the intermediate phase proposed to end on December 31, 2023, it is in the public interest to apply a single domestic content procurement preference to EV chargers, which is consistent with the domestic content procurement preference under section 70912(6)(B) of the Act generally applicable to manufactured products on infrastructure projects receiving Federal financial assistance.

This phased approach will encourage manufacturers to adjust their production processes to increase the amount of domestic content over time, consistent with Congressional direction in BIL § 70935(a), while providing an incentive and advantage to those able to do so more quickly. Applying uniform Buy America requirements, regardless of the source of Federal funding, would benefit potential suppliers of those products by providing a single market for federally assisted projects. Because this new waiver would be applicable to EV chargers and components, FHWA also proposes removing EV chargers from its Manufactured Products General Waiver.

FHWA's Buy America requirements provide that 100 percent of all steel and iron that is permanently incorporated into a project must be domestically manufactured. Additionally, under existing practice, FHWA's Manufactured Products General Waiver applies to all manufactured products except for predominantly steel and iron manufactured products, and predominantly steel and iron components of manufactured products. *See* "Buy America Requirements" Section above for additional discussion of existing FHWA policies. Although their overall iron and steel content may be small — in some cases less than five percent — EV chargers typically include components containing steel and iron, which may also be covered by FHWA's requirement. In today's global manufacturing industry, the components of EV chargers may be obtained from suppliers all over the world. Considering this, it appears impractical for manufacturers in the current market to immediately certify that an EV charger meets FHWA's regulatory requirement of 100 percent domestic iron and steel content.

Moreover, it appears impractical to require States, contractors, and manufacturers to have to potentially comply with multiple different standards applicable to the various components comprising the products. Although FHWA received some promising responses to its RFI on both DCFC and ACL2 chargers, for the reasons discussed above in the section summarizing those comments, it remains uncertain whether these manufacturers are able to meet the unprecedented and immediate demand for Buy America-compliant EV chargers on FHWA-funded projects throughout the U.S.

In ensuring strong and effective Buy America implementation consistent with E.O. 14005, FHWA must also ensure that important Federal programs for transportation infrastructure investment, including EV charger programs specifically, are able to complete infrastructure projects in a timely manner. In response to the RFI, stakeholders have voiced concerns regarding the implementation of Buy America requirements for EV chargers, such as comments indicating that certain components for EV chargers meeting FHWA's Buy America requirement are not currently available to meet anticipated demand. FHWA also received comments indicating that States and industry need additional time to develop processes to certify and demonstrate compliance for EV chargers. FHWA recognizes both the importance of ensuring Buy America compliant EV chargers and the need to implement the requirement in a way that is not overly burdensome to producers and funding recipients or prevents timely and effective delivery of EV charger projects. At present, based in part on information from the RFI, FHWA is proposing to issue the waiver discussed in this notice.

Based on the responses from the RFI, FHWA is proposing to issue a waiver that would step down in incremental stages. The proposed waiver will, if issued, provide an initial interim period during which FHWA's Buy America requirement is completely waived while industry ramps up domestic production of EV chargers. Following this initial period in calendar year 2022, FHWA proposes to partially phase-out the waiver

with two changes occurring during calendar year 2023 and one additional change on January 1, 2024. Following that transition period, FHWA proposes to leave the waiver in place as a general applicability standing waiver for EV chargers, subject to the mandatory periodic review requirement in the BIL. This approach will provide recipients of FHWA financial assistance and their industrial vendors a reasonable transition period to increase the domestic content of their EV chargers.

This proposal is designed to ensure wide availability of EV chargers in the immediate future on FHWA-funded projects but also provide a strong incentive for manufacturers to rapidly shift toward domestic manufacturing processes to comply with the narrowing scope of the waiver for EV chargers during calendar year 2023 and arriving at the final proposed phase on January 1, 2024. FHWA believes this approach will be effective in fulfilling the purpose of E.O. 14005 to help American businesses and workers compete and thrive in the global marketplace.

Should the proposed waiver become effective, FHWA will publish its decision in the Federal Register. The proposed FHWA dates are subject to shortening, extension, or other modification — either prior to issuance of a final waiver or following the effective date of the final waiver and the applicable notice and comment period for modifying the waiver — based on relevant considerations including, but not limited to: (i) the ability of the domestic industry to supply EV chargers that comply with the proposed waiver phases, including producing sufficient volume to meet demand needed for NEVI program goals discussed above; (ii) the ability of States and industry to effectively certify such compliance with the proposed waiver phases. FHWA requests comment on other factors that would be relevant to considering such an adjustment. We also note that phases of this waiver are proposed for efficiency. Should a recipient be unable to meet the general phases of this waiver, a recipient still has the option to request that FHWA grant a

project-specific waiver under 23 U.S.C. 313, for iron, steel, and manufactured products, and Section 70194(b) of the BIL, for construction materials.

The OMB Implementation Guidance also provides that, before granting a waiver in the public interest, to the extent permitted by law, agencies shall assess whether a significant portion of any cost advantage of a foreign-sourced product is “the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products.” OMB Implementation Guidance at p. 12. E.O. 14005 at Section 5 includes a similar requirement for “steel, iron, or manufactured goods.” However, because the public interest waiver that FHWA is proposing in this notice is not based on consideration of the cost advantage of any foreign-sourced steel, iron, or manufactured product content in EV chargers, there is not a specific cost advantage for FHWA to now consider.

Comment Period for Proposed Waiver

FHWA will consider comments received in the 30-day comment period during our evaluation of the waiver request. This comment period length exceeds the minimum comment period requirement in 23 U.S.C. 313(g), and is consistent with the minimum comment period for reviewing general applicability waivers specified in Section 70914(d) of the Act. Comments received after this period, but before notice of our finding is published in the Federal Register, may be considered to the extent practicable. Section 117 of the SAFETEA-LU Technical Corrections Act of 2008 (Pub. L. 110-244, 122 Stat. 1572) requires an additional 5-day, comment period after FHWA publishes a waiver finding notice. Comments received during that period will be reviewed, but the finding will continue to remain valid. Those comments may influence FHWA's decision

to terminate or modify a finding.

Issued in Washington, DC under authority delegated in 49 CFR 1.85 on August 26, 2022.

Stephanie Pollack,

Acting Administrator,

Federal Highway Administration.

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